Stephen Shaiken, Esq. Bar No. 90915
LAW OFFICES OF STEPHEN SHAIKEN
170 Columbus Avenue, Suite 100
San Francisco, CA 94133-5102
Telephone: (415) 248-1012
Fax: (415) 248-0019

Attorney for Petitioner Van Hung Vi

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

Van Hung Vi, Petitioner, vs. Nancy Alcantar, Field Office Director, United States Immigration and Customs Services (USICE), Janet L. Myers, Assistant Secretary and Michael Chertoff, Secretary, Department of Homeland Security Respondents	District Ct. No. C 07 5527 CW: Agency No.: A21 508 838 **TRAVERSE**

The petition for writ of habeas corpus was filed on October 30, 2007, and on December 18, 2007, this Court ordered respondents to show cause within thirty days as to why the petition should not be granted; petitioner was afforded thirty days to file a traverse.

On December 27, 2007, respondents filed a "Response to the Court's December 18, 2007 Order to Show Cause." The pleading did not address the merits of the petitioner's claim, in that it did not justify respondents' hold on petitioner. Instead, respondents urged this Court to dismiss the petition for lack of jurisdiction. The purported lack of jurisdiction was stated as 1.) Petitioner is not in the custody of the respondents because lodging an immigration detainer is not custody for habeas purposes; [1] 2.) The

[1] In support of this argument, respondents cite cases from the Fifth, Sixth and Eleventh Circuits for the proposition that a detainer does not constitute custody for habeas purposes. However, that is not

petition must be filed within the judicial district where petitioner is detained, which is Sacramento, the Eastern District. [2] All other facts relied upon by respondents in their arguments were clear in the petition and clear to the Court, which issued an Order to Show Cause, not a brief on jurisdiction. If the Court believed there were no jurisdiction, in view of an OSC, the court would have issued a dismissal.

Petitioner construes the government's pleading as an Answer, wherein they argue lack of jurisdiction, and accordingly, this reply is properly termed a traverse, even though there are no specific sworn allegations to refute.

However respondents' pleading is characterized, it is without merit and in the abence of any substantial refutation of the claims in the petition, the writ should be granted and respondents ordered to lift the hold.

One glaring problem with respondents' legal analysis is their confusion of jurisdiction and venue.

Prior to addressing the issues of custodian and venue, a brief comment is appropriate as to the issue of custody. The Government's claim that a detainer is not custody in immigration habeas cases is incorrect. They cite out-of-circuit cases, but ignore the law in the Ninth Circuit. In this circuit, a mere detainer letter may not constitute custody (Garcia v. Taylor , 40 F.3d 299 (1994), but the Circuit has never resolved the issue (Guti v. INS, 908 F.2d 495 (9th Cir. 1990)[holding that a claim that a detainer is custody is not frivolous]. Where there is a detainer and a final order, as here, then there is custody. Galaviz-Medina v. Wooten, 27 F.3d 487, 492-93 (10th Cir. 1994); cert. den. 513 U.S. 1086 (!995); Ceballos de Leon v Reno, 58 F. Supp. 2d 463, 469, n. 14 (D.N.J 1999). This circuit has held that where there is a

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the law in this Circuit. As is argued herein, a detainer plus a final order of deportation, as is the case here, has repeatedly been found to constitute custody. Additionally, this Circuit has held that there is no controlling authority on the issue, b ut there is support for the argument that it is custody.

[2] Respondents also argued that there is no habeas jurisdiction to challenge a final order of deportation, but as is crystal clear in the petition, it is not the final order that is being challenged in any way. What Petitioner challenges is a detainer placed on him in apparent violation of Supreme Court holdings and without legal basis.

detainer and a warrant, there is custody. Chung Young Chew, 309 F.2d 857, 865 (9th Cir. 1962) [cited in Garcia v. Taylor].

Historically, habeas jurisdiction is not limited to the petitioner's place of confinement, but is limited only by the court's jurisdiction over the custodian. Braden v 30th Judicial Circuit Ct., 410 U.S. 484, 485-95 (1973). Here, this court has jurisdiction over the respondents, who have prosecuted the deportation case against petitioner in this jurisdiction, and who maintain their offices in this jurisdiction, and maintain their supervision of petitioner in this jurisdiction.

Habeas jurisdiction is proper over a custodian even if they are not physically present in this jurisdiction, so long as the custodian is subject to the long arm jurisdiction of the court where the petition is filed. Strait v. Laird, 406 U.S341, 345 (1972). For the reasons stated in the petition and summarized in the proceeding sentence, there is no question but that this Court has jurisdiction over respondents, long arm and by physical presence. Accordingly, jurisdiction is not an issue, and the proper question is whether this Court is a proper venue for the petition. See Runsfeld v Padilla, 542 U.S. 426, 121 S. 2711Ct. at 2728 (2004)

In Rumsfeld v. Padilla, U.S.542 U.S. 426, 121 S.Ct. 2711 (2004), the Supreme Court distinguished Strait v. Laird and Braden, supras, and held that where physical detention was being challenged,, habeas must be brought against the immediate custodian and must be filed in the district where the custodian is located. There is no doubt that respondents are located in this jurisdiction through the operation of their offices in San Francisco, and the central issue is whether they are immediate custodians for habeas proses.

Padilla was no a case involving an alien, and thus it specifically declined to decide if its ruling applied to persons in immigration custody "pending deportation" . 121 S.Ct 2718 n.8 . On this issue, there is a split among the circuits. The Ninth Circuit has held that while the question of who is a proper respondent/custodian im immigration habeas cases in not clear, it held that the Attorney General (would now be the Secretary of the Department of Homeland Security) , especially because the Attorney General was a "unique decision maker". Ali v. Ashcroft, 346 F.3d 873; 887-88 (9th Cir. 2003) [citing Armentero v. INS , F.3d (9th Cir)

Moving to the venue issue, it is noted that venue is generally resolved on issues such as the ,location of the relevant records, the convenience of the parties, and the location of the events. So v. Reno, 251 F. Supp. 2d 1112, 1126-27 (E.D.N.Y. 2003). Here, the official records of ICE are in San Francisco, the decision to place a hold on him was made in San Francisco, the actual decision makers in this case are based in San Francisco, and counsel for petitioner is located in San Francisco. All venue factors militate in favor of this district, and none in favor of any other district. Post-Padilla cases have held that ICE is a proper custodian and venue is proper even where petitioner is detained in a different jurisdiction that the ICE offices. Parlak v. Baker, 374 F. Supp. 2d 551, 555-58 (C.D. Mich. 2005); Samir v. U.S., 354 F. Supp. 2d 215, 218-19 (E.D.N.Y. 2005).

Even if this court were to determine that the proper venue is Sacramento (Eastern District) solely because that is where petitioner is detained, the remedy would be transfer, not dismissal; §242 of the Immigration and Nationality Act, governing judicial review of immigration matters, allows transfer from one district court to another. Simpson v. Ashcroft, 321 F. Supp. 13 (D.D.C. 2004)

Respondents' arguments in favor of dismissal for lack of jurisdiction- the only arguments they make-are without support. According, the petition for writ of habeas corpus should issue and respondents ordered to release the hold.

Dated January 7, 2008 at San Francisco, CA

Respectfully submitted,

THE LAW OFFICES OF STEPHEN SHAIKEN

By: S/s shaiken

Stephen Shaiken, Esq.